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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE:

AIR CRASH AT SAN FRANCISCO,
CALIFORNIA, ON JULY 6, 2013

MDL No.: 2497

ORDER GRANTING DEFENDANT ASIANA'S
MOTION TO DISMISS; DENYING PLAINTIFFS'
MOTION FOR LEAVE TO AMEND

THIS ORDER RELATES TO:

*Lin Yang and Jing Zhang v. Asiana Airlines,
Inc. et al.*
Case No. 14-CV-02038

Dkt. Nos. 780, 800

Plaintiffs Lin Yang and Jing Zhang bring this action against defendant Asiana Airlines, Inc. (“Asiana”) to recover damages for personal injuries they allegedly sustained while traveling as passengers on board Asiana Flight 214, which crashed on landing at San Francisco International Airport on July 6, 2013. Now before the Court is Asiana’s motion to dismiss plaintiffs’ claims against Asiana for lack of subject matter jurisdiction pursuant to Fed. R. Civ. Pro. 12(b)(1) and 12(h)(3). (Dkt. No. 780.)¹ On May 31, 2017, plaintiffs filed a separate motion containing various

¹ Plaintiffs filed their opposition brief on May 18, 2017. (Dkt. No. 812, “Opp’n to MTD”.) Asiana filed its reply on May 25, 2017. (Dkt. No. 813, “Reply ISO MTD”.) In connection with Asiana’s Reply ISO MTD, Asiana raised objections to several exhibits filed in connection with plaintiffs’ Opp’n to MTD, namely Exhibits 6-10 and 13 to the declaration of Mary Schiavo, (Dkt. No. 812-1), pursuant to Federal Rule of Evidence 602. According to Asiana, plaintiffs have not demonstrated personal knowledge required to authenticate these documents. The objection with regard to Exhibit 6 (Asiana’s General Conditions of Carriage for Intentional Passenger and Baggage) is **OVERRULED** because this document was created by Asiana and was incorporated by reference into the tickets at issue, which Asiana attached to a declaration filed in connection with its motion to dismiss. (Dkt. No. 780, Declaration of Hombum Yi (“Yi Decl.”), Exs. A, B.) With regard to the remaining documents, the objection is **SUSTAINED** because plaintiffs’ counsel has not demonstrated personal knowledge required to authenticate these third-party documents.

1 evidentiary objections to the first declaration of Jennifer J. Johnson, (Dkt. No. 814), and exhibits
2 attached thereto, and to the Yi Decl. (Dkt. No. 819.)² Also before the Court is plaintiffs' motion to
3 file an amended complaint alleging "Asiana's negligent failure, refusal, delay and/or denial to
4 permit or provide adequate care to Plaintiffs after Plaintiff Zhang was seriously injured and near
5 death after the crash of Asiana Flight 214." (Dkt. No. 800.)

6 Having carefully considered the pleadings and the papers submitted on these motions, oral
7 argument held on July 28, 2017, and for the reasons set forth below, defendant's motion to dismiss
8 is **GRANTED** and plaintiffs' motion for leave to amend is **DENIED** as moot.

9 **I. Relevant Background**

10 This case arises in the context of multidistrict litigation stemming from injuries sustained
11 by all passengers and crew on Asiana Flight 214. (Dkt. No. 105, Notice of Adoption of Master
12 Consolidated Complaint by Plaintiffs Lin Yang and Jing Zhang ("Notice of Adoption of MC") ¶
13 2.) Discovery has progressed in the actions brought and the facts described herein are not in
14 dispute (unless otherwise noted.) Plaintiffs' airline tickets list four flights operated by Asiana. Mr.
15 Yang's travel was ticketed electronically as follows:

ELECTRONIC TICKET RECORD FROM AMADEUS		ELECTRONIC TICKET RECORD FROM AMADEUS			
ASIANA AIRLINES	28JAN13	08300666	ASIANA AIRLINES	28JAN13	08300666
NKG INTERNATIONAL T/T C	CHND001	NK	NKG INTERNATIONAL T/T C	CHND001	NK
PNR 1E/JYK920		T SHA/T 021-6	PNR 1E/JYK920		T SHA/T
YANG/LIN MR			021-6		
S CP BRDOFF FLT CLS DATE TIME ST FARE BASIS	NVB		YANG/LIN		
NVA BAG			MR		
F 1 PVG/CN OZ362 V 06JUL 1205 OK VLRT9CN			S CP BRDOFF FLT CLS DATE TIME ST FARE BASIS	NVB	
06JUL 2PC			NVA BAG		
F 2X/CNSFO OZ214 V 06JUL 1630 OK VLRT9CN			A 1X/CNPVG OZ367 S 21JUL 2000 OK SLRT9CN		
06JUL 2PC			06JUL 2PC		
3 SURFACE			V NONENDS NO-MILEUG S NONENDS NO-		
A 4 LAX/CN OZ201 S 20JUL 1340 OK SLRT9CN			MILEUG		
06JUL 2PC			06JUL13SHA OZ X/SEL OZ SFO M/IT /-LAX OZ X/SEL OZ SHA		
V NONENDS NO-MILEUG S NONENDS NO-			M/IT E		
MILEUG			ND ROE6.227810 XT		
06JUL13SHA OZ X/SEL OZ SFO M/IT /-LAX OZ X/SEL OZ			16AY216US32XA44XY35YC2024YQ28XFLAX4.5		
SHAH M/IT E			IT FARE TICKET		
ND ROE6.227810 XT			TOTALTAX		
16AY216US32XA44XY35YC2024YQ28XFLAX4.5			2609		
IT FARE TICKET			FOP		
TOTALTAX	2609		CASH		
FOP CASH			TKT NO 988 3230381130 CONJ 1130-1131		
TKT NO 988 3230381130		CONJ 1130-1131			

2 Pursuant to Local Rule 7-3(a)(1), "evidentiary and procedural objections to the motion must be contained within the brief or memorandum." Plaintiffs have failed to comply with the local rules by filing evidentiary objections in a separate motion. Therefore, Dkt. No. 819 is **STRICKEN**.

1 Ms. Zhang's was similarly ticketed:

ELECTRONIC TICKET RECORD FROM AMADEUS	
ASIANA AIRLINES 28JAN13	08300666
NKG INTERNATIONAL TT/C CHND001	
NK	
PNR 1E/JYK920	T SHA/T021-6
ZHANG/JING MS	
S CP BRDOFF FLT CLS DATE TIME ST FARE BASIS NVB	
NVA BAG	
F 1 PVGICN OZ362 V 06JUL 1205 OK VLRT9CN	
06JUL 2PC	
F ZX/CNSFO OZ214 V 06JUL 1630 OK VLRT9CN	
06JUL 2PC	
3 SURFACE	
A 4 LAXICN OZ201 S 20JUL 1340 OK SLRT9CN	
06JUL 2PC	
V NONENDS NO-MILEUG S NONENDS NO-	
MILEUG	
06JUL13SHA OZ X/SEL OZ SFO M/IT /-LAX OZ X/SEL OZ	
SHA M/IT E	
ND ROE6.227810 XT	
16AY216US32XA44XY35YC2024YQ28XFLAX4.5	
IT FARE TICKET	
TOTALTAX 2609	
FOP CASH	
TKT NO 988 3230381134 CONJ 1134-1135	
ELECTRONIC TICKET RECORD FROM AMADEUS	
ASIANA AIRLINES 28JAN13	
08300666	
NKG INTERNATIONAL TT/C	
CHND001 NK	
PNR 1E/JYK920 T SHA/T	
021-6	
ZHANG/JING MS	
S CP BRDCFF FLT CLS DATE TIME ST FARE BASIS NVB NVA	
BAG	
A 1X/ICNPVG OZ367 S 21JUL 2000 OK SLRT9CN 06JUL 2PC	
V NONENDS NO-MILEUG S NONENDS NO-MILEUG	
06JUL13SHA OZ X/SEL OZ SFO M/IT /-LAX OZ X/SEL OZ M/IT E	
ND ROE6.227810 XT	
16AY216US32XA44XY35YC2024YQ28XFLAX4.5 IT FARE TICKET	
TOTALTAX	
2609	
FOP	
CASH	
TKT NO 988 3230381135 CONJ 1134-1135	

14 (Dkt. 40-3 at 2-3 (“Tickets”).) The parties agree that the references signify the following: (1)
15 Shanghai, People’s Republic of China, to Seoul, South Korea on July 6, 2013; (2) Seoul to San
16 Francisco, California on July 6, 2013; (3) surface travel; (4) Los Angeles, California to Seoul on
17 July 20, 2013; and (5) Seoul to Shanghai on July 21, 2013. Plaintiffs did not book a flight from
18 San Francisco to Los Angles because plaintiffs planned to travel to Los Angeles by bus or private
19 car. (Dkt. No. 40, Ex. 4 at 91:22-25.) The tickets incorporate by reference Asiana’s “General
20 Conditions of Carriage for International Passenger and Baggage.” (Dkt. No. 40, Ex. 5 (“General
21 Conditions”).) Plaintiffs’ tickets were issued at the same time (January 28, 2013), at the same
22 location (202 North Zhong Shan Road in Nanjing, China), and bear sequential ticketing numbers.
23 (See Tickers at 2-3 (“CONJ 1130-1131” for Yang tickets and “CONJ 1134-1135” for Zhang
24 tickets); see also Yi Decl. ¶ 10, Exs. A and B (time and location of ticket booking).)

25 Plaintiffs filed their lawsuit on May 2, 2014 and adopted the master consolidated
26 complaint on May 27, 2014. (See Notice of Adoption of MC ¶ 3.) Plaintiffs have also filed a
27 lawsuit against Asiana in South Korea, which remains pending. (Dkt. No. 814, Johnson Decl. ¶¶ 3-
28 4.)

1 **II. Legal Framework**

2 **A. Subject Matter Jurisdiction**

3 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the subject
4 matter jurisdiction of the Court. *See, e.g., Savage v. Glendale Union High Sch.*, 343 F.3d 1036,
5 1039–40 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009 (2004). When subject matter jurisdiction is
6 challenged, the burden of proof is placed on the party asserting that jurisdiction exists. *Scott v.*
7 *Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (holding that “the party seeking to invoke the court’s
8 jurisdiction bears the burden of establishing that jurisdiction exists”). Accordingly, the court will
9 presume lack of subject matter jurisdiction until the plaintiff proves otherwise in response to the
10 motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376–78 (1994).

11 Motions under Rule 12(b)(1) may be either “facial” or “factual.” *Safe Air for Everyone v.*
12 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.
13 2000)). In a facial attack, the movant argues that the allegations of a complaint are insufficient to
14 establish federal jurisdiction. *Id.* By contrast, a factual attack or “speaking motion” disputes the
15 allegations that would otherwise invoke federal jurisdiction. *Id.* In resolving a factual attack,
16 district courts may review evidence beyond the complaint without converting the motion to
17 dismiss into a motion for summary judgment. *Id.* (citing *Savage*, 343 F.3d at 1039 n. 2). Courts
18 consequently need not presume the truthfulness of a plaintiff’s allegations in such instances. *Id.*
19 (citing *White*, 227 F.3d at 1242). Indeed, “[o]nce the moving party has converted a motion to
20 dismiss into a factual motion by presenting affidavits or other evidence properly before the court,
21 the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its
22 burden of establishing subject matter jurisdiction.” *Id.* (quoting *Savage*, 343 F.3d at 1039 fn. 2).
23 Further, the existence of disputed material facts will not preclude a trial court from evaluating for
24 itself the merits of jurisdictional claims, except where the jurisdictional and substantive issues are
25 so intertwined that the question of jurisdiction is dependent on the resolution of factual issues
26 going to the merits. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing
27 *Thornhill Publ’g Co. v. Gen. Tel. Corp.*, 594 F.2d 730, 733–35 (9th Cir. 1979)).

28 //

1 **B. Montreal Convention**

2 The 1929 Convention for the Unification of Certain Rules Relating to International
3 Transportation by Air (“Warsaw Convention”) established a treaty governing the rights and
4 liabilities of passengers and carriers in international air transportation. *See El Al Israel Airlines,*
5 *Ltd. v. Tseng*, 525 U.S. 155, 161 (1999). The 1999 Convention for the Unification of Certain
6 Rules for International Carriage by Air, May 28, 1999 (“Montreal Convention”) is the successor
7 treaty to the Warsaw Convention. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 996 (9th Cir.
8 2002). The Montreal Convention completely replaces the Warsaw Convention, but retains many
9 of the same provisions and terms. *See* Montreal Convention, *reprinted in* S. Treaty Doc. No. 106–
10 45, 1999 WL 33292734 (2000), Art. 55. Although the Warsaw Convention is no longer in effect,
11 courts in the United States continue to rely on cases interpreting the Warsaw Convention when a
12 provision is materially similar to that in the Montreal Convention. *See Narayanan v. British*
13 *Airways*, 747 F.3d at 1125, 1127 (9th Cir. 2014); *Phifer v. Icelandair*, 652 F.3d 1222, fn. 1 (9th
14 Cir. 2011); *Best v. BWIA W. Indies Airways Ltd.*, 581 F. Supp. 2d 359, 362 (E.D.N.Y. 2008)
15 (“Because many of the provisions of the Montreal Convention are taken directly from the Warsaw
16 Convention and the many amendments thereto, the case law regarding a particular provision of the
17 Warsaw treaty applies with equal force regarding its counterpart in the Montreal treaty”).

18 The Montreal Convection covers “all international carriage of persons, baggage or cargo
19 performed by aircraft for reward.” Montreal Convention, Art. 1(1); *see also Narayanan*, 747 F.3d
20 at 1127. Further, it provides the “exclusive basis for a lawsuit against an air carrier for injuries
21 arising out of international transportation.” *Kruger v. United Airlines, Inc.*, 481 F. Supp.2d 1005,
22 1008 (N.D. Cal. 2007). In interpreting the Montreal Convention, courts begin by looking at its
23 text. *Narayanan*, 747 F.3d at 1127. Pursuant to the Montreal Convention, a passenger must bring a
24 damages action against an air carrier in one of five jurisdictions. Article 33 of the Convention
25 provides, in relevant part:

- 26 (1) An action for damages must be brought, at the option of the
27 plaintiff, in the territory of one of the High Contracting Parties, either
28 [1] before the court of the domicile of the carrier or of [2] its principal
place of business, or [3] where it has a place of business through which

the contract has been made, or [4] before the court at the place of destination.

(2) In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in [5] the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

Montreal Convention, Art. 33(1), (2) (brackets supplied). The Convention thus “appears to confer jurisdiction on those countries with a particular interest in the litigation or with a particular competency, because of the location of the parties or the evidence, to decide the matter.” *In Re Air Crash Disaster Near Warsaw, Poland, on May 9, 1987*, 760 F. Supp. 30, 32 (E.D.N.Y. 1991). “The country of ultimate destination of the passenger is presumably included because that country, where the passenger is likely to have an enduring if not permanent relationship, has a particular interest in the action” *Id.* Plaintiffs bear the burden of proof for establishing jurisdiction. *Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995); *Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990). United States courts lack subject matter jurisdiction over a passenger’s claims unless the passenger can show that at least one of the five territories listed above is in the United States. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *Hornsby v. Lufthansa German Airlines*, 593 F.Supp.2d 1132, 1135-1136 (C.D. Cal. 2009).

C. Leave to Amend

Under Federal Rule of Civil Procedure 15(a)(2), leave to amend a pleading “shall be freely given when justice so requires.” Fed. R. of Civ. Pro. § 15(a)(2). The Ninth Circuit has held that “Rule 15’s policy of favoring amendments to pleadings should be applied with ‘extreme liberality.’” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987); *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). “Four factors are commonly used to determine the

1 propriety of a motion for leave to amend. These are: bad faith, undue delay, prejudice to the
2 opposing party, and futility of amendment.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186
3 (9th Cir. 1987) (citing *Loehr v. Ventura Cty. Cmty. Coll. Dist.*, 743 F.2d 1310, 1319 (9th Cir.
4 1984)).

5 **III. Discussion**

6 **A. Motion to Dismiss**

7 Defendant moves to dismiss plaintiffs’ claims on the ground that plaintiffs cannot show
8 that any of the five territorial prongs specified in the Montreal Convention supports jurisdiction in
9 the United States. The Court treats defendant’s motion as a factual attack on subject matter
10 jurisdiction and therefore considers all admissible evidence in the record.

11 Plaintiffs effectively concede that the first three options do not provide jurisdiction here.
12 (Opp’n to MTD at 17.) Instead, plaintiffs primarily focus on the fourth option in arguing that their
13 “place of destination” was in the United States. Plaintiffs also aver that the fifth option is satisfied
14 because plaintiffs were *de facto* residents of the United States during the three months that Ms.
15 Zhang was receiving medical care.

16 1. *Place of Destination*

17 The Court first considers whether plaintiffs can satisfy their jurisdictional burden under the
18 fourth prong of Article 33 of the Montreal Convention, which allows passengers to file suit in the
19 jurisdiction of their “place of destination.”

20 For the purposes of Article 33, the “place of destination is determined by discerning the
21 “intention of the parties as expressed in the contract of transportation, i.e., the ticket or other
22 instrument.” *Sopcak*, 52 F.3d at 819; *see also Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 167-
23 69 (2d Cir. 1997). Contracts of transportation “should be interpreted according to the objective,
24 rather than the subjective, intent of the parties.” *Id.* Although “a passenger’s intent is accorded
25 considerable weight in ascertaining the final destination, ‘when a contract is unambiguous, the
26 instrument alone is taken to express the intent of the parties.’” *Id.* (quoting *Swaminathan*, 962 F.2d
27
28

1 at 389). The parties' dispute centers on the relevance and legal analysis, if any, of an "open jaw"³
2 ticket. The parties agree that the "place of destination" for a round trip flight is the place of origin
3 for the purposes of the Montreal Convention. Plaintiffs argue, however, that Mr. Yang and Ms.
4 Zhang were not traveling on round trip tickets but rather on "open jaw" itineraries, *i.e.*, one side of
5 the "jaw" being the inbound flight to the United States (Shanghai to Seoul to San Francisco) and
6 the outbound from the United States being the other (Los Angeles to Seoul to Shanghai). Plaintiffs
7 characterize the itinerary as two separate contracts of transportation, the first of which had a "place
8 of destination" in San Francisco for the purposes of the Montreal Convention. Defendant counters
9 that the exclusive "place of destination" for an undivided transportation is the "ultimate
10 destination," namely Shanghai. *See In re Alleged Food Poisoning*, 770 F.2d at 6. Defendant
11 bases this classification on the argument that plaintiffs' air travel should be deemed a "single
12 undivided transportation" with one place of destination, *i.e.* the "ultimate destination." *Id.*
13 (emphasis in original).

14 The "place of destination" for a "single operation of undivided transportation" is the
15 ultimate destination. *See Petrire*, 756 F.2d at 266 (internal quotations omitted). A mere "agreed
16 stopping place" does not constitute a "place of destination" because a "single, undivided
17 transportation has only one beginning and one end . . . [this is] logically clear . . ." *See In re*
18 *Alleged Food Poisoning*, 770 F.2d at 6; *see also Petrire v.* 756 F.2d at 266; *Vergara*, 390 F. Supp.
19 at 1269 (D. Neb. 1975) (noting that "in a trip consisting of several parts it is the ultimate
20 destination that is accorded treaty jurisdiction"). A review of the relevant cases reveals that courts
21 consider several factors in determining whether transportation has been regarded by the parties as
22 a "single operation," namely when and where the tickets were issued; whether the tickers were
23 issued sequentially, and anticipated duration of stopover. *See Petrire*, 756 F.2d at 266; *In re*
24 *Alleged Food Poisoning*, 770 F.2d at 6; *Haldimann v. Delta Airlines, Inc.*, 168 F.3d at 1326.

25
26 ³ "Open jaw" itineraries are similar to round trip itineraries but contain at least one open
27 leg for which the passenger must secure his or her own means of transportation. For example, an
28 open jaw itinerary could contain two legs, (i) Tokyo, Japan to Seattle, Washington and (ii)
Vancouver, Canada to Tokyo, Japan.

1 Although no court has ruled on the specific issue of whether an open jaw itinerary
2 constitutes a single contract with one destination, several federal courts have found that facts
3 similar to those here constitute a single contract with one destination. *Petrire* is instructive. There,
4 the Second Circuit considered whether two ticket booklets⁴ issued simultaneously by a single
5 carrier constitute a single, undivided transportation. *Petrire*, 756 F.2d at 264-65. The first booklet
6 covered travel from Madrid, Spain; to Malaga, Spain; to New York City. The second booklet
7 covered the flight from New York City to Madrid. *Id.* The aircraft crashed en route to New York
8 City. *Id.* at 265. Plaintiff averred that jurisdiction in the United States was permissible under the
9 Convention because each of the two booklets constituted a separate contract with a distinct “place
10 of destination,” namely New York City and Madrid, respectively. *Id.* In holding that “there was
11 only one contract and one transportation,” the Second Circuit highlighted that the two ticket
12 booklets were issued sequentially; at the same time and place; even though it involved a five-day
13 stopover. *Id.* at 265-66. The court further noted that the relevant inquiry in determining whether
14 multiple ticket booklets “constitute a single contract for purposes of the Treaty are the time and
15 place of issuance of the booklets and the contemplated degree of continuity of the journey being
16 ticketed.” *Id.*; *see also Vergara*, 390 F. Supp. at 1269 (finding one undivided trip under the
17 Convention despite six ticket booklets involving eight different airlines partly because the
18 booklets were purchased at the same time and place). The *Petrire* court therefore concluded that
19 plaintiff’s destination Madrid, not New York, for purposes of the Convention. *Id.* at 266; *see also*
20 *Kruger*, 2007 WL 3232443 at *3-6 (analyzing time and location of ticket purchase and anticipated
21 stopover duration).

22 Similarly, *In re Alleged Food Poisoning* involved air travel on successive carriers. There,
23 plaintiff was issued two travel booklets, the first covering air travel from Riyadh, Saudi Arabia; to
24 Dharhan, Saudi Arabia; to London, United Kingdom; to Washington, D.C.; and New York City,

25
26 ⁴ A ticket booklet was essentially a packet consisting of two or more perforated coupons
27 which can be detached and presented for inspection to airport staff during check-in and/or
28 boarding. *See Euland v. M/V Dolphin IV*, 685 F. Supp. 942, 943-44 (D.S.C. 1988); *see also*
Wallace Bus Forms, Inc. v. UARCO Inc., 1986 WL 8960 at *1 (N.D. Ill. 1986), *aff’d sub nom.*
Wallace Computer Servs., Inc. v. Uarco Inc., 824 F.2d 977 (Fed. Cir. 1987).

1 and the second covering the plaintiff's flight from New York to Riyadh. *Id.* at 5. British Airways
2 was the carrier for plaintiff's flight from London to Washington, D.C., but was not involved in the
3 remainder of the trip. *Id.* The court highlighted that, notwithstanding the separate ticket booklets
4 and two carriers, there existed one contract of transportation with one place of destination because
5 plaintiff purchased his tickets at the same time and place from a single carrier. *Id.* at 6. Plaintiff's
6 intermediate stops in the United States were deemed agreed-upon stopping places, not distinct
7 places of destination. *Id.* In rejecting plaintiff's argument that the place of destination for
8 purposes of the Warsaw Convention was Washington, D.C., the Second Circuit held that when the
9 parties "have regarded the transportation as a single, undivided operation, the beginning of that
10 operation is the origin and the end of the operation is the destination." *Id.* (citing *Gayda v. LOT*
11 *Polish Airlines*, 702 F.2d 424, 425 (2d Cir. 1983)); *See also Haldimann*, 168 F.3d at 1325-26
12 (holding that tickets issued simultaneously "at a single place" constitute one undivided contract of
13 carriage).

14 Here, each plaintiff purchased a single contract of transportation for ¥ 2,396 which
15 provided for transportation by a single carrier (Asiana) issued at the same time (January 28, 2013)
16 and place (202 North Zhong Shan Road in Nanjing, China). *See Petrire* 756 F.2d at 266.
17 Plaintiffs' tickets bear sequential numbers. (*See Tickets at 2-3*); *see also Petrire*, 756 F.2d at 266;
18 *In re Alleged Food Poisoning*, 770 F.2d at 6. With regards to the "contemplated degree of
19 continuity of the journey being ticketed," all of the flights were scheduled to occur within a two-
20 week period for flights both into and out of the United States. *Id.*

21 Based on these "objective facts of the ticketing," the Court thus finds "a single operation of
22 undivided transportation." *See Petrire*, 756 F.2d at 266 (internal quotations omitted.) The sole
23 "place of destination" for purposes of the Convention of a single contract is the ultimate
24 destination, namely Shanghai. *See Id; In re Alleged Food Poisoning*, 770 F.2d at 6.⁵ Thus,

25
26 ⁵ Although not dispositive, the fact that plaintiffs' tickets bear the notation "CONJ" further
27 supports a finding that the place of destination is the "ultimate destination," namely Shanghai. *See*
28 *In re Alleged Food Poisoning*, 770 F.2d at 6. "CONJ" indicates that these are "conjunction
tickets," which refer to two or more tickets used on a single itinerary. (Dkt. No. 813 ¶¶ 6-7, 10-
11.) Several federal courts have found that the "place of destination" for purposes of the
Convention for a conjunction ticket is the "ultimate destination" for the purposes of jurisdiction.

1 whether plaintiffs' tickets are characterized as "open jaw" is not dispositive. The issue is whether,
2 based on the objective evidence, the parties intended the contract of transportation to be a single
3 undivided transportation with one place of destination (Shanghai), or two separate operations with
4 two different destinations. (San Francisco and Shanghai, respectively).

5 Plaintiffs contend that the issue presents a matter of first impression because plaintiffs
6 were traveling on open jaw itineraries and Asiana's own policies support the claim that the final
7 destination should be considered San Francisco. Plaintiffs' argument focuses on the incorporation
8 by reference of Asiana's General Conditions into its tickets which define various types of "trips."
9 Thus, a round trip is defined as:

10 . . . travel from one point to another and return by the same air route used
11 outbound whether or not the fares outbound and inbound be the same, or travel
from one point to another and return by an air route different from that used
outbound, for which the same normal through one-way fare is established

12 (General Conditions., Art. 1.27.) A circle trip is:

13 . . . travel from a point and return there to by a continuous, circuitous air route;
14 provided that where no reasonable direct scheduled air route is available
between two points, a break in the circle may be traveled by any other means
of transportation without prejudice to the circle trip

16 (*Id.*, Art. 1.9.) An open-jaw trip "means travel which is *essentially of a round trip nature* but the
17 outward point of departure and inward point or arrival and/or outward point of arrival and inward
18 point of departure . . . are not the same." (*Id.* Art. 1.22 (emphasis supplied).) The General
19 Conditions further state that that the term "'[d]estination' means the ultimate stopping place
20 according to the contract of carriage. *In the case of a round trip or a circle trip, the destination is*
21 *the same place as the point of origin.*" (*Id.* Art. 1.15 (emphasis supplied).) Based on a
22 comparison of these definitions, plaintiffs contend that Asiana thus treats open jaw trips as "two
23 separate trips, obviously having two separate destinations" because open jaw trips are
24 "specifically excluded" and not listed along with round and circle trips as having "the point of

25
26 *Id.* (emphasis in original). "[W]hen separate tickets are issued for different portions of a trip, if
27 they are issued in conjunction with each other or refer to each other, the destination will always be
the last stop." See *Gasca v. Empresa De Transporte Aero Del Peru*, 992 F. Supp. 1377, 1380 (S.D.
28 Fla. 1998).

1 origin” as the “destination.” (See Opp’n to MTD at 19.) According to plaintiffs, this renders the
2 contract of transportation ambiguous as to whether the tickets are round trip or open jaw, and any
3 ambiguity should be construed against Asiana. (*Id.* at 21.)

4 Plaintiffs do not persuade. Under Asiana’s General Conditions, “Destination” is defined as
5 “the ultimate stopping place according to the contract of carriage.” The fact that the General
6 Conditions may specify an example does not change the definition. In addition, the General
7 Conditions state that “[n]othing in these Conditions of Carriage . . . modifies any provision of the
8 [Warsaw or Montreal] Convention.” (General Conditions, Art. 2.1.) This Court is bound in light
9 of the controlling Ninth Circuit and other case law interpreting the Convention discussed above to
10 define the location of the “ultimate destination” based on the principles discussed herein. Asiana’s
11 omission of open-jaw trips from the examples of trips for which the “destination is the same place
12 as the point of origin” is not dispositive.

13 Further, as discussed above, plaintiffs here purchased their tickets at the same time and
14 place and the tickets bear sequential numbers. The tickets also indicate that Asiana was the only
15 carrier involved in providing air travel. Any ambiguity as to the precise characterization of the
16 tickets does not change the rule. What matters is that the parties contemplated a “single operation
17 of undivided operation transportation.” *Petrile*, 756 F.2d at 265-66; see also *In re Alleged Food*
18 *Poisoning*, 770 F.2d at 6. Thus, where the objective facts show that the transportation was part of
19 a single operation, only one destination exists, the “end of the operation.” *In re Alleged Food*
20 *Poisoning*, 770 F.2d at 6; *Gayda*, 702 F.2d at 425. Here, “the end of the operation” is Shanghai.
21 *Id.*

22 The Court thus holds that plaintiffs have failed to satisfy their burden of showing that this
23 court has jurisdiction pursuant to the “place of destination” prong of Article 33.⁶

24 **2. Principal and Permanent Residence**

25 The Court now turns to whether plaintiffs have carried their jurisdictional burden pursuant
26 to the fifth prong of Article 33, which bases jurisdiction on passengers’ principal and permanent

27
28 ⁶ The Court notes that plaintiffs raise equitable arguments but provide no authority for the
Court to ignore the Montreal Convention for equitable reasons. The Court declines to do so.

1 residence. *See* Montreal Convention Art. 33(2). Plaintiffs claim that jurisdiction is proper because
2 plaintiffs resided in the United States while receiving medical care for approximately three months
3 following the crash. According to plaintiffs, the United States became the *de facto* principal and
4 permanent residence of the plaintiffs while Ms. Zhang underwent and recovered from brain
5 surgery.

6 Pursuant to Article 33(2) “principal and permanent residence” is “the one fixed and
7 permanent abode of the passenger at the time of the accident.” *See also In re Air Crash Over Mid-*
8 *Atl. on June 1, 2009*, 760 F. Supp.2d 832, 836 (N.D. Cal. 2010). Plaintiffs’ admit in their
9 operative pleading that “Plaintiffs’ principal and permanent residence is in People’s Republic of
10 China.” (Notice of Adoption of MC ¶ 3.) Plaintiffs cite no authority for the proposition that
11 residing in the United States for three months while receiving medical care is sufficient to
12 establish principal and permanent residence for the purposes of Article 33. More importantly,
13 plaintiffs’ time in the United States *subsequent* to the accident is not relevant to establishing
14 principal and permanent residence because residence under Article 33 is determined “at the time
15 of the accident.” *See In re Air Crash Over Mid-Atl.*, 760 F. Supp. 2d at 836. The Court
16 recognizes that Ms. Zhang’s time spent in the United States receiving medical care was difficult to
17 endure. However, the Court cannot find that plaintiffs had a principal and permanent residence in
18 San Francisco “at the time of the accident.” *See id.*

19 Therefore, the Court finds that plaintiffs did not have a principal and permanent residence
20 in the United States at the time of the crash. Accordingly, plaintiffs have failed to demonstrate
21 that this Court has jurisdiction under the fifth jurisdictional prong.

22 Accordingly, defendant’s motion to dismiss is **GRANTED**.

23 **B. Motion for Leave to Amend**

24 Plaintiffs seek leave to file an amended complaint pursuant to Federal Rule of Civil
25 Procedure 15(a)(2) alleging that Asiana negligently failed to provide adequate care to Ms. Zhang.
26 In light of the Court’s ruling on defendant’s motion to dismiss, this Court lacks jurisdiction to hear
27 plaintiffs’ claims. Therefore the motion for leave to amend is **DENIED** as moot.

28 //

1 **IV. Conclusion**

2 For the foregoing reasons, defendant's motion to dismiss is **GRANTED** and plaintiffs'
3 motion for leave to amend is **DENIED** as moot.

4 This Order terminates Dkt. Nos. 780, 800.

5 **IT IS SO ORDERED.**

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7 Dated: August 14, 2017

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YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE